

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

9 Kelly Luckadoo,) No. CIV 09-0518-PHX-MHM (DKD)
10 Petitioner,)
11 vs.) **REPORT AND RECOMMENDATION**
12 Berry Larson, et al.,)
13 Respondents.)
14)

REPORT AND RECOMMENDATION

15 TO THE HONORABLE MARY H. MURGUIA, UNITED STATES DISTRICT JUDGE;

16 Kelly Luckadoo filed a petition for writ of habeas corpus and an amended petition on
17 March 13, 2009, challenging his convictions in Maricopa County Superior Court for first
18 degree murder, burglary, robbery and theft. The trial court imposed concurrent terms for the
19 burglary and theft convictions, to be served consecutive to the life sentence imposed for the
20 murder conviction. The trial court ordered the sentence for the robbery conviction to be
21 served concurrent with the life sentence. He raises three grounds for habeas relief: (1) newly
22 discovered evidence requires a new trial; (2) counsel was ineffective in failing to uncover
23 evidence critical to his self-defense claim; and (3) prosecutorial misconduct prevented
24 Luckadoo from presenting evidence of self-defense. Respondents contend that the petition
25 is untimely. The Court agrees that the petition is untimely and that Luckadoo has not
26 established that he is entitled to equitable tolling, and recommends that his petition be denied
27 and dismissed with prejudice.

1 Following his convictions and sentencing, Luckadoo sought direct review. On
2 October 26, 1993, the court of appeals affirmed his convictions and sentences (Doc. #25, Exh
3 G). On November 10, 1993, he filed a petition for review in the Arizona Supreme Court; on
4 May 17, 1994, the supreme court denied review (*Id.*, Exh H, I).

5 On November 22, 2004, more than 10 years later, Luckadoo filed his first notice of
6 post-conviction relief (*Id.*, Exh J). Counsel filed a petition on February 1, 2005, raising three
7 issues: (1) newly discovered evidence exists that might have changed the verdict; (2)
8 Luckadoo was denied a fair trial as a result of prosecutorial misconduct in using unreliable
9 evidence at trial; and (3) he was denied a fair trial and the effective assistance of counsel
10 when trial counsel failed to uncover evidence critical to Luckadoo's self-defense claim (*Id.*,
11 Exh K). On December 5, 2005, the trial court dismissed the petition, ruling that the
12 prosecutorial misconduct claim was precluded because it had already been raised on appeal
13 and that the remaining claims failed to raise a colorable claim for relief (*Id.*, Exh L).

14 On January 9, 2006, Luckadoo filed a motion for rehearing; the motion was denied
15 on March 17, 2006 (*Id.*, Exh M, N). On April 17, 2006, Luckadoo filed a petition for review
16 in the Arizona Court of Appeals; on June 19, 2007, the court of appeals summarily denied
17 review (*Id.*, Exh O, P). On July 10, 2007, he petitioned for review in the Arizona Supreme
18 Court; on September 10, 2007, the petition was summarily denied (*Id.*, Exh Q, R). On March
19 13, 2009, Luckadoo filed his federal petition.

20 Luckadoo was required to file his federal petition within one year of the "date on
21 which the judgment became final by the conclusion of direct review or the expiration of the
22 time for seeking such review." 28 U.S.C. § 2244(d)(1)(A); *Jimenez v. Quarterman*, 129
23 S.Ct. 681, 685 (2009). However, "[t]he time during which a properly filed application for
24 State post-conviction or other collateral review with respect to the pertinent judgment or
25 claim is pending shall not be counted toward any period of limitation under this subsection."
26 See 28 U.S.C. § 2244(d)(2). Luckadoo's conviction became final on August 17, 1994, ninety
27 days after the Arizona Supreme Court denied review. See *Bowen v. Roe*, 188 F.3d 1157,
28

1 1158-59 (9th Cir. 1999). Because his conviction became final before April 24, 1996, the
2 effective date of the Antiterrorism and Effective Death Penalty Act of 1996, the statute of
3 limitations began to run on April 25, 1996, and expired on April 24, 1997. *Patterson v.*
4 *Stewart*, 251 F.3d 1243, 1256 (9th Cir. 2001). Absent any statutory tolling, he was required
5 to file his federal petition on or before April 24, 1997.

6 Respondents argue that the one-year period of limitations was tolled from April 25,
7 1996, through September 10, 2007, the date the Arizona Supreme Court denied review of the
8 dismissal of his post-conviction petition. The Court disagrees with Respondents that *any*
9 tolling occurred during this period. Luckadoo filed *no* pleadings in state court from May 19,
10 1994 to November 22, 2004. The statute of limitations is not tolled between the conviction's
11 finality and the filing of the first state collateral challenge because there is nothing pending
12 during that interval. *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 529
13 U.S. 1104 (2000). Luckadoo is also not entitled to any tolling for the time period between
14 November 22, 2004, and September 10, 2007, when he was pursuing collateral review. In
15 order to qualify for statutory tolling during the time a petitioner is pursuing collateral review
16 in the state courts, a prisoner's application for collateral review must be constructively filed
17 *before*, not after, the expiration of the AEDPA's one-year limitations period. “[A] properly
18 and timely filed petition in state court only tolls the time remaining in the federal limitation
19 period.” *See Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001), *cert. denied*, 538 U.S. 949,
20 123 S.Ct. 1627, 155 L.Ed.2d 492 (2003). There can be no tolling following the expiration
21 of the limitations period because “there is no period remaining to be tolled.” *Webster v.*
22 *Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000), *cert. denied*, 531 U.S. 991 (2000). Finally,
23 Luckadoo's petition for post-conviction relief, filed six years after the expiration of the
24 limitations period, does not revive the expired limitations period. *See Ferguson v.*
25 *Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

26 Assuming that equitable tolling is available to Luckadoo, *see Bowles v. Russell*, 551
27 U.S. 205, 209-15 (2007), the Court concludes that he is not entitled to such tolling. He has
28

1 not demonstrated that he had been pursuing his rights diligently and the existence of any
2 extraordinary circumstances which prevented him from timely filing his petition. *Pace v.*
3 *DiGuglielmo*, 544 U.S. 408, 418-19 (2005). Indeed, Luckadoo did not file a Reply to the
4 Answer. Therefore, he necessarily has failed to explain why he waited over ten years
5 following the conclusion of direct review to initiate post-conviction proceedings.

6 **IT IS THEREFORE RECOMMENDED** that Kelly Luckadoo's amended petition
7 for writ of habeas corpus be **denied and dismissed with prejudice** (Doc. #2).

8 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave
9 to proceed *in forma pauperis* on appeal be **denied** because dismissal of the Petition is
10 justified by a plain procedural bar and jurists of reason would not find the ruling debatable.

11 This recommendation is not an order that is immediately appealable to the Ninth
12 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
13 Appellate Procedure, should not be filed until entry of the district court's judgment. The
14 parties shall have fourteen days from the date of service of a copy of this recommendation
15 within which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1);
16 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen
17 days within which to file a response to the objections. Failure timely to file objections to the
18 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report
19 and Recommendation by the district court without further review. *See United States v.*
20 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any
21 factual determinations of the Magistrate Judge will be considered a waiver of a party's right
22 to appellate review of the findings of fact in an order or judgment entered pursuant to the
23 Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

24 DATED this 5th day of April, 2010.



25
26
27 David K. Duncan
28 United States Magistrate Judge